United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/ affidavit of mailing

75-1343

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To be argued by
HERBERT G. JOHNSON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1343

UNITED STATES OF AMERICA,
Appellee,

—against—

CARLOS FAYAD and PAULA DALLAL,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Carlos Fayad and Paula Dallal appeal from judgments of the United States District Court for the Eastern District of New York, (Platt, *J.*) entered on different dates convicting them, following a jury trial, of violating Title 21, United States Code, Sections 841(a)(1) and 846 and Title 18, United States Code, Section 2, as charged in various counts of a four-count indictment.

Defendant Fayad was charged in Count 2 of the indictment with distribution of approximately one ounce of cocaine hydrochloride, in Count 3 with possession with intent to distribute approximately eight ounces of cocaine hydrochloride and in Count 4 with conspiracy to distribute quantities of cocaine hydrochloride. He was found guilty on Counts 3 and 4 but was found not guilt on Count 2. He was sentenced on September 5, 1975, to a five-year

term of imprisonment on each count on which he was convicted, to be served concurrently, and also to a special parole term of fifteen years on condition that he leave the United States and not return during such parole term. He is presently serving such sentence.

Defendant Dallal was charged in Count 1 of the indictment with distribution of approximately three-quarters of an ounce of cocaine hydrochloride, in Count 2 with distribution of approximately one ounce of cocaine hydrochloride and in Count 4 with conspiracy to distribute quantities of cocaine hydrochloride. She was found guilty on each of those counts and was sentenced on September 19, 1975, for treatment and supervision pursuant to Title 18, United States Code, Section 5010(b) under the Federal Youth Correction Act until discharged by the Youth Correction Division of the United States Board of Parole as provided in Title 18, United States Code, Section 5017(e). She is presently on bail of $10,000 personal recognizance bond pending determination of this appeal.[1]

Defendant Fayad appeals his conviction on the ground that the trial judge's refusal to reiterate to the jury that

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[1] A third co-defendant, Robert O'Brien, was charged in all four counts of the indictment. After the jury had been selected and sworn, however, he entered a plea of guilty to Count 1 and testified at the trial as a witness for the government. He was sentenced on September 5, 1975, pursuant to Title 18, United States Code, Section 3651 for treatment and supervision in a federal youth correction facility for a term of five years on condition that he be confined in such facility for a period of six months and the execution of the remainder of such term of confinement was suspended; he was also placed on probation pursuant to Title 18, United States Code, Section 5010(a) for a period of four and one-half years. On motion of the Government, Counts 2, 3 and 4 were dismissed against him. He is presently serving such sentence.

portion of his charge in which he instructed them that they might find both of the defendants guilty, or one of them guilty and the other not guilty, or both not guilty (even though his trial counsel subsequently withdrew his request for such reiteration) constituted reversible error.

Defendant Dallal appeals her conviction on the ground that the portion of the trial judge's charge in which (over the objection of her trial counsel) he instructed them that in raising the issue of entrapment the defendant had the burden of proof by a preponderance of the evidence that the Government initiated the criminal transaction involved in the case, although the Government retained the burden to prove beyond a reasonable doubt that the defendant had a propensity to commit the crime, constituted reversible error.[2]

Statement of the Case

On March 7, 1975, Special Agent Alfred Cavuto of the Drug Enforcement Administration, acting in an undercover capacity, was introduced by a government informant named Jeff to defendant Dallal for the purpose of purchasing cocaine (T. 276; T. 815-16; TG. 128-29).[3]

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[2] Subsequent to the trial in this case, both defendants filed motions for a new trial based solely upon the issues raised in this appeal. Such motions were denied by the trial judge.

[3] The letter "T" followed by a number or numbers in parentheses refers to a page or pages in the trial transcript. Such pages are found in part in the appendix to defendant Dallal's brief to this Court and in part in the appendix to the Government's brief. References are to those portions of the trial transcript contained in defendant Dallal's appendix except where the letter "T" is followed by the letter "G", which indicates those portions contained in the Government's appendix.

They immediately began a discussion of the purchase of approximately three-quarters of an ounce of cocaine for $900, as well as of possible purchases of other drugs (TG. 129-32; TG. 869-73; T. 816). Following a telephone call received by defendant Dallal from someone named "Robby", the three persons drove to a meeting place where defendant Dallal introduced Agent Cavuto to co-defendant Robert O'Brien (TG. 133-35; TG. 874-75). O'Brien then joined the three persons in the car and Agent Cavuto purchased approximately three-quarters of an ounce of cocaine hydrochloride from him in exchange for $900 (TG. 136-38; TG. 453-54; TG. 875-77).

On April 30, 1975, Agent Cavuto again met with defendant Dallal and together they drove to a meeting with O'Brien where Agent Cavuto purchased approximately one ounce of cocaine hydrochloride from O'Brien in exchange for $1300, $100 of which O'Brien gave to defendant Dallal for her introduction of Agent Cavuto to him (TG. 199, 202-05; TG. 454-55, 468; TG. 862, 906-09).

On May 21, 1975, Agent Cavuto met with O'Brien in front of O'Brien's apartment house and, when O'Brien showed Cavuto approximately eight ounces of cocaine hydrochloride, Cavuto and other agents of the Drug Enforcement Administration arrested him (TG. 239-42, 248; TG. 461-62). O'Brien, after being advised of his constitutional rights, told Drug Enforcement Administration agents that he had received the cocaine from defendant Fayad, who was then in O'Brien's apartment awaiting his return in order to receive $8200 from the proceeds of the anticipated sale (TG. 462-63; TG. 643-44). Special Agent Robert McKinley then entered O'Brien's apartment and placed defendant Fayad under arrest (TG. 644-45). After being advised of his rights, defendant Fayad admitted orally to having supplied the

eight ounces of cocaine, but he repudiated that statement at trial (TG. 645-47; TG. 968).

On June 18, 1975, Agent Cavuto arrested defendant Dallal pursuant to a warrant (TG. 269-71; TG. 913-14).[4]

ARGUMENT

POINT I

The jury was properly instructed and understood that they could find one defendant not guilty while finding the other guilty in any count in which both defendants were charged.

In his charge to the jury, the trial judge gave standard, commonly used, complete and detailed instructions with respect to the law of conspiracy (T. 1091-99). In particular he instructed the jury as follows:

> "The indictment charges a conspiracy among the the defendants Dallal and Fayad and also O'Brien, all of whom are named in the indictment as co-conspirators. A person cannot conspire with himself or herself and therefore you cannot find any of the defendants guilty unless you find beyond a reasonable doubt that he or she participated in the conspiracy as charged with at least one other person. With this qualification you may find both of the defendants guilty or one of the defendants guilty and one of the defendants not guilty, or both not guilty, all in accordance with these instructions and the facts you find." (T. 1098-99).

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[4] We have reserved for the argument portion of this brief (Point II, *infra*) a discussion of the testimony at trial of defendant Dallal.

Notwithstanding the above instruction, at the conclusion of the judge's charge the following colloquy occurred out of the presence of the jury:

> "Mr. Tirelli [Counsel for Defendant Fayad]: I felt it wasn't clear to the jury that they could find one defendant guilty and another defendant innocent. Maybe I didn't properly submit it.
>
> The Court: If there is any doubt about that I will be glad to take that up with the jurors.
>
> Mr. Tirelli: You did say it but I was thinking that maybe it was not clear enough.
>
> The Court: You want me to say you can find either of the defendants guilty or one defendant guilty and one not guilty?
>
> Mr. Kaplan [Counsel for Defendant Dallal]: I object to the reiteration.
>
> The Court: I agree. If he wants it done now, and if you both want it done I will do it.
>
> Mr. Kaplan: I do not.
>
> Mr. Tirelli: I bow to the superior wisdom of the two of you." (T. 1120-21).

It is, therefore, clear that (1) a careful and specific charge on the question of the separate guilt of each defendant was given to the jury; (2) the trial judge was willing to reiterate such instruction provided that counsel for both defendants so desired and agreed; (3) trial counsel for defendant Dallal objected to such reiteration; and (4) trial counsel for defendant Fayad explicitly acquiesced in the trial judge's declination to reiterate the point because of such objection.

Furthermore, it is clear from the results of their deliberations that the jury understood the charge on this point as given. On page 2 of defendant Fayad's brief to this Court, it is stated that "[s]urprisingly, Count Three which was the only Count in which co-defendant Paula Dallal was not named, was the only Count on which Carlos Fayad, the Defendant-Appellant herein was found 'Not Guilty' by the jury." That is incorrect. In fact, as demonstrated from the District Court's criminal docket entry for July 16, 1975, contained on page 2 of the appendix to defendant Fayad's brief, the jury found defendant Fayad guilty on Counts 3 and 4 of the Indictment and not guilty on Count 2. Excluding the third co-defendant O'Brien, who pled guilty at the beginning of the trial, the four-count indictment charged defendants Dallal and Fayad as follows:

> Count 1 (distribution of cocaine on March 7, 1975)—Dallal only.
>
> Count 2 (distribution of cocaine on April 30, 1975)—Dallal and Fayad.
>
> Count 3 (possession with intent to distribute cocaine on May 21, 1975)—Fayad only.
>
> Count 4 (conspiracy to distribute cocaine)—Dallal and Fayad. (Appendix to defendant Dallal's brief, pp. 5a-6a).

Defendant Dallal was convicted by the jury on Counts 1, 2 and 4 (TG. 1131). Defendant Fayad was convicted on Count 3 (where he was the sole defendant) and on Count 4 (the conspiracy count wherein he and Dallal were co-defendants). As stated above, however, he was acquitted on Count 2 (where he and Dallal were co-defendants) (*Id.*).

The verdict thus clearly indicates that the jury understood that they could find one defendant not guilty while finding the other guilty in any count in which both were charged (as the jury in fact did—to the benefit of defendant Fayad—with respect to Count 2). There can be no

question that the jury were given and followed proper instructions on this question.[5]

POINT II

The District Court was not required to charge the jury on the issue of entrapment.

The defense of entrapment is a very limited one. *United States* v. *Russell*, 411 U.S. 423, 435 (1973). This Court has consistently held that where there is uncontroverted evidence of a defendant's propensity to commit a crime, the issue of entrapment need not be submitted to the jury, even where the Government (or its agents) has provided the inducement. *United States* v. *Licursi*, slip opinion 6449, 6557 (2d Cir. November 11, 1975); *United States* v. *Miley*, 513 F. 2d 1191, 1202 (2d Cir. 1975); *United States* v. *Braver*, 450 F. 2d 799, 805 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972). As this Court has stated in *United States* v. *Riley*, 363 F. 2d 955, 959 (2d Cir. 1966):

> "[E]ven when inducement has been shown, submission to the jury is not required if uncontradicted proof has established that the accused was 'ready and willing without persuasion' and to have been 'awaiting any propitious opportunity to commit the offense.' In such cases there is no real issue for the jury even though in strict theory it might create one by speculating that the agents had found the defendant less willing than they said."

The Government's evidence of defendant Dallal's propensity to commit the crimes charged in the indictment

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[5] To the extent that defendant Fayad's contention may be that evidence of association is inadmissible in a trial which includes a charge of conspiracy, we must reject such suggestion. *See United States* v. *Ellis*, 461 F.2d 962, 970 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972); *United States* v. *Armone*, 363 F.2d 385, 403-04 (2d Cir.), *cert. denied*, 385 U.S. 957 (1966).

is not only overwhelming and uncontroverted, it was bolstered by defendant Dallal herself. Agent Cavuto testified that immediately after he was introduced to defendant Dallal at their first meeting at her apartment on March 7, she said "You're late. I got a call from Robby [O'Brien] and someone wants to buy a quarter of an ounce." (TG. 129-30); that at that meeting she had admitted to him that she had been involved in prior drug sales (TG. 130); that she attempted to sell him other controlled substances such as a "Thai stick", which is a stick wrapped in marijuana (TG. 131) and an ounce of marijuana (TG. 132); that later she offered him a "spoon of zoom", which is a quantity of amphetamines (TG. 189; T. 885); and that she told him that she and her roommate had dealt with 68 other persons prior to the cocaine transaction charged in this indictment (TG. 208).

On cross-examination, defendant Dallal not only confirmed virtually all of the evidence offered by the Government on the issue of propensity; she contradicted none of it and added further admissions to it. She testified that she had previously obtained cocaine from O'Brien for a friend (TG. 848-51) and had also been buying drugs over a period of months from one Joe Monti (TG. 854). She stated that O'Brien liked to keep moving while dealing in drugs (TG. 857) and that she had received $100 from O'Brien for introducing Agent Cavuto to him (TG. 862).

She stated that Agent Cavuto's testimony had been substantially correct as to the events of March 7 (TG. 869-70) and she went on to confirm that testimony and also virtually all of the rest of Agent Cavuto's testimony point by point. She admitted telling Agent Cavuto when he first walked into her apartment that he was late for a drug deal (TG. 870) and later that she had taken others to O'Brien for drugs (TG. 871); attempting to sell Agent Cavuto a "Thai stick" (*Id.*) and an ounce of marijuana (TG. 872-73) during their first meeting; and later offering him a "spoon of zoom" (T. 885). She admitted that

she, her roommate and friends took barbiturates prior to the incidents alleged in the indictment (T. 886; TG. 920). The only instance in which she failed to corroborate fully Agent Cavuto's testimony with respect to propensity occurred when she stated that she could not remember whether she had told him that she and her roommate had previously dealt with 68 people (TG. 911).

Under the test in this Circuit, defendant Dallal was clearly "ready and willing without persuasion and was . . . awaiting any propitious opportunity to commit the offence." *United States* v. *Sherman*, 200 F.2d 880, 882 (2d Cir. 1952), *rev'd on other grounds*, 356 U.S. 369 (1958). Certainly she was not "a person otherwise innocent whom the government is seeking to punish for an alleged offence which is the product of the creative activity of its own officials." *Id.*, quoting *Sorrells* v. *United States*, 287 U.S. 435, 451 (1932).

Direct testimony of defendant Dallal is cited in her brief to this Court suggesting that her will was overborne. Such testimony goes not to her propensity to commit the crimes charged, which was well-established as set forth above, but rather to the inducement for her to do so. Such testimony was unsubstantiated and not corroborated by any other witness. However, even where there is some evidence of inducement, if the evidence of propensity is uncontradicted, no entrapment instruction need be given. *United States* v. *Licursi*, *supra*; *United States* v. *Miley*, *supra*; *United States* v. *Braver*, *supra*; *United States* v. *Riley*, *supra*.

This is not a case like *United States* v. *Anglada*, slip opinion 217 (2d Cir. October 16, 1975), where the informant who convinced the defendant to arrange a sale of heroin was the brother of the defendant's girl friend and was known to him to be an addict. *Id.* at 220. The defendant there also testified that he had never used or sold heroin. *Id.*; *see also* the cases cited therein at 222-23. Here the informant was a casual friend of the defendant Dallal

whom she had met more than a year and a half ago but had not seen again until shortly before the date of the first transaction charged in the indictment (TG. 863-66). Defendant Dallal's previous use and participation in sales of drugs here was extensive, as set forth above.

The jury verdict finding defendant Dallal guilty on all three counts in which she was charged clearly shows that the Government proved her propensity beyond a reasonable doubt. *Cf. United States* v. *Russell, supra*, 411 U.S. at 436; *United States* v. *Rosner*, 485 F.2d 1213, 1221-22 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974). Inasmuch as defendant Dallal was not entitled to any instruction on the issue of entrapment, she cannot now be heard to object to the language of the charge that was in fact given, for any such error was harmless. Moreover, as we shall show in Point III, *infra*, no error was in fact committed.

POINT III

The District Court's charge on the issue of entrapment was proper.

This Court long ago adopted a bifurcated entrapment charge concerning the burden of proof set forth in the opinion of Judge Learned Hand in *United States* v. *Sherman, supra*, 200 F.2d at 882-83: "[I]n [entrapment] cases two questions of fact arise: (1) did the agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offence. On the first question the accused has the burden; on the second the prosecution has it."

It was a derivative of the *Sherman* charge, and a charge identical to that at issue here, which was upheld in *United States* v. *Braver, supra*. This Court in *Braver* traced the history in the Second Circuit of the bifurcated

charge and reaffirmed the principle that a defendant had some burden of proof in an entrapment defense. *Id.* at 802. The court then acknowledged that, while the district judge had not committed any error, the "burden of proof" language in the charge might confuse a jury; it therefore suggested that a preferred charge avoid the terms "burden" and "burden of proof." *Id.* at 804-05.

This Court has not spoken again in the four years since *Braver* on the question of a bifurcated charge on entrapment. However, as recently as 1973 in addressing the question of respective burdens in the context of an entrapment defense, the Court stated: "When the defendant sustains the burden of proving government inducement, the burden then is cast upon the Government to prove the defendants' predisposition. . . ." *United States* v. *Rosner, supra,* 485 F.2d at 1221.

The charge on the issue of entrapment given by the trial judge in this case was detailed, clear and complete. (T. 1103-05). Although in form it may not have been "preferred" by this Court, taken as a whole it clearly was neither confusing to the jury nor erroneous as a matter of law.[6] Furthermore, in view of the fact that a charge on the entrapment issue need not have been given in this case (*see* Point II, *supra*), the rendering of a "non-preferred", though correct, charge could not constitute reversible error.

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[6] Moreover, given that the trial judge instructed the jury that "[t]he burden [of proof] is always upon the prosecution to prove guilt beyond a reasonable doubt . . . [and that] burden never shifts to a defendant . . ." (T. 1084); and further (within the context of the instruction on entrapment) that the jury would be required to acquit defendant Dallal "... if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit an offense of the character charged..." (T.1104), we can see no conceivable prejudice to defendant Dallal on this point.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

Dated: December 8, 1975

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 11th day of December, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Louis A. Tirelli, Esq.	Kenneth Kaplan, Esq.
52 So. Main St.	666 Fifth Avenue
Spring Valley, N.Y. 10977	New York, N.Y. 10022

Evelyn Cohen

Sworn to before me this
11th day of Dec. 1975

Juanita Mayo

JUANITA MAYO
Notary Public, State of New York
No. 24-4501911
Qualified in Kings County
Commission Expires March 30, 1977